88-1488

No. ———

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF DALLAS,
*Petitioner,*

v.

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Does a city building inspector's decision to issue notice of a zoning violation, which is subject to *de novo* review by the City's Board of Adjustment under state law, constitute the exercise of the City's "final policy-making authority" under the Sherman Anti-Trust Act and 42 U.S.C.A. § 1983, as interpreted by this Court in *St. Louis v. Prapotnik*, 485 U.S. ——, 108 S.Ct. 195 (1988)?

## PARTIES TO THIS PROCEEDING

In addition to those parties named in the caption, the following is also a party to this proceeding:

Warner Amex Cable Communications, Inc./
Defendant-Appellee

The following are potential parties to this suit:

Frank Parrish/Plaintiff-Appellant
Jack Weiss/Plaintiff-Appellant
(Campbell Family Productions)

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OCTOBER TERM, 1988

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CITY OF DALLAS,

*Petitioner,*

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VIDEO INTERNATIONAL PRODUCTIONS, INC.,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## OPINIONS BELOW

Petitioner seeks review of the October 31, 1988 decision of the United States Court of Appeals for the Fifth Circuit which is reprinted as Appendix A. The Fifth Circuit affirmed in part and remanded in part the decision of the District Court. The Fifth Circuit's Order Denying Rehearing is unreported and is reprinted as Appendix B. The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas-Dallas Division (Fitzwater, S.) is reported at 858 F.2d 1075 and is reprinted as Appendix C.

## JURISDICTION

The decision and judgment of the Fifth Circuit Court of Appeals was entered October 31, 1988. A petition for panel rehearing and suggestion of rehearing *en banc* was

denied on January 23, 1989. The mandate was stayed on February 8, 1989 up to and including March 10, 1989 and is reprinted as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## STATUTES AND ORDINANCES INVOLVED

Because of the number of laws involved in this proceeding, appropriate portions of each are set forth in Appendix F. Their citations are as follows:

15 U.S.C.A. § 1

15 U.S.C.A. § 2

42 U.S.C.A. § 1983

Tex. Loc. Gov't Code Ann. § 211.009 (Vernon 1988)

Tex. Loc. Gov't Code Ann. § 211.010 (Vernon 1988)

Dallas Development Code § 51-4.217(a)

Dallas Development Code § 51-4.703(d)

## STATEMENT OF THE CASE

### Facts Leading To Lawsuit

Video International Productions, Inc. ("VIP") operated a nonfranchised cable television company within the city limits of Dallas. VIP installed satellite dish antennas (earth stations) on the premises of various apartment complexes and, through underground cables, transmitted signals received by the antennas to individual apartments. Each satellite dish served the host complex as well as separately-owned neighboring apartment complexes. The underground cables crossed private lot lines.

Pursuant to a franchise agreement with the City of Dallas, Warner Amex Cable Communications, Inc. ("WAX") has the right to install cable in public rights-of-way for the provision of cable services to the citizens of Dallas.

Section 51-4.202 of the Dallas Development Code (Dall. Dev.C.) prohibits placement of cable facilities within a residential area unless it is an "accessory use." An accessory use is a "use customarily incident to the main use." Dall.Dev.C. § 51-4.217(a)(1). The accessory use must be located on the same lot as the main use. Dall. Dev.C. § 51-4.217(a)(4). In this case, the accessory use on the lot is the antenna and the apartment complex is the main use on the lot. The Dallas Development Code has not been challenged on constitutional or other grounds. Only the application of the Code has been challenged.

Silver Screen, a competitor of VIP in the cable television business in Dallas, sought to operate as a nonfranchised cable television company. The fundamental difference between Silver Screen and VIP, for purposes of this Petition, is that Silver Screen located their antenna on the same lot of the particular apartment the antenna served. Silver Screen's system did not cross private or public lot lines. The Board of Adjustment, in a nonprecedential decision, determined that since Silver Screen's operation did not cross lot lines it was a permissible accessory use and Silver Screen could charge tenants for cable TV services. The building inspector requested that the Board of Adjustment uphold his interpretation of the zoning code as it applied to Silver Screen, which the Board did. (Appendix E) No similar action was taken regarding VIP because only notices of zoning violations were issued to VIP; no citations of zoning violations were issued to VIP; the City did not cut off VIP's utilities or take any kind of physical action against VIP; the City did not institute suit or procure any type of restraining order or deny any permit; and no appeal from any decision by the building inspector was ever made by VIP.

A city building inspector issued notices of zoning violations to VIP apparently based on his determination that VIP's cables, which crossed private lot lines, vio-

lated the accessory use provision of the Dallas Development Code. VIP did not exhaust its remedies concerning the interim decision of the building inspector. VIP was entitled to a *de novo* appeal, but voluntarily stopped their operation on the advice of its attorneys in an attempt to increase damages. (Tr. II, p. 84; City Exhibit 27).

**The Federal District Court Decision**

VIP sued WAX and the City for alleged anti-trust and § 1983 violations and for tortious interference with the contract between VIP and Campbell Family Productions (which was attempting to purchase VIP at the time zoning violation notices were issued). The jury found for VIP on all claims and awarded damages as follows: zero damages for anti-trust violations; $200,000 compensatory damages and $2,500,000 in punitive damages for § 1983 violations; and $1,245,000 in actual and $500,000 in punitive damages for tortious interference with the contract involving potential Plaintiffs Frank Parrish and Jack Weiss (Campbell Family Productions).

The City and WAX moved for judgment notwithstanding the verdict and VIP moved for judgment on the verdict and for a new trial on the issues of damages for the violations of anti-trust laws. The District Court found that WAX was not liable to VIP on any of VIP's theories of recovery because they were protected by the First Amendment Right to petition the government under the *Noerr-Pennington* doctrine.

The District Court determined that there was sufficient evidence to support the jury's finding that the City had violated VIP's First Amendment right to free speech under § 1983; that City was liable for anti-trust violations; that the City had not tortiously interfered with VIP's contract with Campbell Family Productions; and that the City was immune from punitive damages. Therefore, the Court concluded that VIP was entitled to

$200,000 actual damages from the City and entitled to recover its attorney's fees and expenses incurred in prosecuting its § 1983 action.

**The Fifth Circuit Decision**

The U.S. Court of Appeals for the Fifth Circuit considered VIP's appeal and the City's cross-appeal and affirmed the jury's findings on liability. All questions of damages were remanded for new trial.

Judge William L. Garwood dissented from the Court's decision to hold the City liable under the Sherman Act and for First Amendment violations under § 1983 because action of the building official in issuing the zoning violation notices was "without any legal significance and did not constitute the City's legally final determination that a zoning violation had occurred." Appendix A, p. 26a.

> "The Board of Adjustment, which is as much an agency of the City of Dallas as is the building inspection department, is the City's final authority for interpreting its zoning ordinances and granting variances therefrom. That, coupled with the lack of any relevant legal effect of the building inspection department's violation notices, renders it inappropriate to hold the City liable merely because such notices were issued. A final decision by the City, with actual concrete legal injury, was not shown to have ever occurred. *Cf. Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3120, 87 L.Ed.2d 126 (1985); *City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S.Ct. 915, 924, 926, 99 L.Ed.2d 107 (1988)."

*Id.*, p. 27a.

The City filed a petition for rehearing *en banc* asserting that the Court (1) incorrectly determined that the City building inspector could make a final determination constituting city policy; (2) incorrectly determined that

the City could not avail itself of the *Noerr-Pennington* exception to liability for anti-trust and civil rights violations; and (3) incorrectly substituted its own decision for the jury's award of zero damages on the anti-trust issue. The City's petition for rehearing was denied. The Fifth Circuit stayed the mandate through March 10, 1989.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Fifth Circuit's decision is in direct conflict with this Court's pronouncement in *City of St. Louis v. Prapotnik*, 485 U.S. ——, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). In *Prapotnik*, the Court stated that government action may subject the government to § 1983 liability only if those actions are taken by municipal officials who have "final policy-making authority." *Prapotnik* at L.Ed.2d 118. In discussing whether a decision constitutes city policy, the Court stated:

> "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. [Emphasis in original.] *Prapotnik* at L.Ed.2d 120.

The Court also noted that a federal court should not assume "that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at L.Ed.2d 120. Applicable law in this context is state law. *Id.* at L.Ed.2d 118.

Texas state law and local law contain several provisions concerning policy-making authority for zoning issues. Texas Local Government Code § 211.009 gives to a municipally created Board of Adjustment the power

to hear and decide appeals that allege error in a determination made by an administrative official in enforcement of zoning laws, the power to make special exceptions to zoning ordinances, and authorization to create a zoning variance. Texas Local Government Code § 211.009(a)(1)-(3). The Board of Adjustment also has authority to reverse, modify or affirm, in whole or in part, the administrative official's determination. Texas Local Government Code § 211.009(b).

Under Texas law, a city which disagrees with the decision of the building official may, itself, appeal that decision to the Board of Adjustment. Tex. Loc. Gov't Code § 211.010 (Vernon 1988); *City of Amarillo v. Stapf*, 129 Tex. 81, 101 S.W.2d 229 (Tex. Comm'n App. 1937, opinion adopted). Texas Local Government Code § 211.009(b) gives the Board of Adjustment the right to reverse any decision of the building inspector. The City of Dallas expressly incorporates this state law into its Development Code at § 51-4.703(d)(3). Thus, because both the legislature of the State of Texas and local law provide for *de novo* review of decisions made by building inspectors, it is clear that the city employee issuing the zoning infraction notices in this case had no authority to establish municipal policy. *Prapotnik* at L.E.2d 129 (concurring opinion).

In this case, the Fifth Circuit's finding of a policy attributable to the City is an attempt to fit the case under one of the exceptions noted in *Prapotnik*. The *Prapotnik* decision identifies two exceptions to the general rule: (1) a permanent and wide-spread series of actions so settled that it constitutes custom or usage with the force of law (*Id.* at L.Ed.2d 120), and (2) express approval by the policymaking authority of the subordinate's decision (*Id.* at L.Ed.2d 122).

Although the Fifth Circuit cites *Prapotnik* in its decision, their reliance on this case is misplaced. The de-

cision by the Fifth Circuit ignores several important facts: (1) decisions made by the Board of Adjustment in the City of Dallas are, by statute, nonprecedential and have no applicability outside the facts determined on a case-by-case basis. Dall.Dev.C. § 51-4.703(d)(5); (2) at most, the Board of Adjustment's decision involving Silver Screen was simply an agreement with the discretionary decision made by the building inspector concerning Silver Screen without casting that decision in the form of a policy statement applicable to VIP;[1] (3) Silver Screen's operation, which did not involve the crossing of lot lines, was fundamentally different from VIP's operation which involved laying cables across private lot lines, therefore, the issue of whether the provisions of the zoning code which were applied to Silver Screen's operation would also apply to VIP was not actually presented and debated at Silver Screen's hearing; (4) any and all decisions made by the building inspector of the City of Dallas are appealable *de novo* to the Board of Adjustment. Because there was no appeal, there was no ratification of the building inspector's decision.

Thus, the Fifth Circuit has misapplied this Court's decision in *Prapotnik*. Although *Prapotnik* states that ratification by policymakers of a subordinate's decision may constitute a final decision, such a case does not exist here. The inspector's attempt to properly interpret policy was not a means to establish policy. The Fifth Circuit's statement that the appealability of the inspector's action did not render the decision nonfinal, assumes the "policy" is a foregone conclusion. The Fifth Circuit thereby allows VIP to create city policy where none previously existed simply by VIP's voluntarily choosing not to ap-

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[1] "Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." *Prapotnik* at L.Ed.2d 122.

peal to the policy-making Board. Notice of zoning violation informs the recipient of a zoning violation but does not result in a citation being issued or a fine being imposed. If the building inspector determines the violation for which the notice was issued has not been corrected, he may issue a citation which may result in prosecution and a fine. Here, no citations were ever issued to VIP.

The Fifth Circuit erroneously assumed that the decision by the Board of Adjustment regarding Silver Screen became a policy of the City applicable to VIP because "the building inspector had requested and received the Board of Adjustment's approval of his interpretation of the zoning regulations during the Silver Screen case." *VIP v. WAX*, 858 F.2d 1075 (5th Cir. 1988). Following *Prapotnik* and applying Texas law, the logical conclusion in the present case is that issuance of zoning violation notices by the building inspector is not a final decision under the Sherman Anti-Trust Act or § 1983, and does not subject the City to liability under those statutes.

Although the Fifth Circuit has remanded to the District Court the issue of damages, the liability issues are final. The Court should grant this Petition for Writ of Certiorari to determine the liability issue and prevent unnecessary relitigation of the damage issues in the District Court.

## CONCLUSION

For the reasons stated, Petitioner respectfully requests that its Petition for Writ of Certiorari be granted, and that the Supreme Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit to the extent that it does not comport with the Court's decision in *City of St. Louis v. Prapotnik* on the issue of final policy-making authority attributable to a city.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 87-1572

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
*Plaintiff-Appellant,*
*Cross-Appellee,*

v.

WARNER-AMEX CABLE COMMUNICATIONS, INC., *et al.*,
*Defendants-Appellees,*

THE CITY OF DALLAS,
*Defendant-Appellee,*
*Cross-Appellant.*

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Oct. 31, 1988

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Appeal from the United States District Court
for the Northern District of Texas

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Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Video International Productions, Inc. ("VIP"), a non-franchised cable television company in Dallas, Texas, sued the City of Dallas ("the City") and Warner-Amex Cable

Communications, Inc. ("WAX"), the sole franchised cable television company in Dallas, for attempting to put VIP out of business, primarily through the use of zoning ordinances. VIP argued three theories before the district court: antitrust and civil rights violations, and tortious interference with a contract to sell VIP. The jury found liability under all three theories, and awarded VIP zero damages for its antitrust claim; $200,000 compensatory and $2.5 million punitive damages for its civil rights claim; and $1.245 million actual and $500,000 punitive damages for the tortious interference with contract claim. The district court granted judgment n.o.v. with regard to all claims against WAX and the tortious interference claim against the City. VIP appeals the judgment n.o.v., and also challenges the jury's zero damage award for the antitrust claim. The City cross-appeals, challenging the jury's verdict on the civil rights claim. The parties also dispute myriad smaller issues, such as pre- and post-judgment interest and attorneys' fees.

We affirm most of the judgment of the district court as relates to liability, but remand for a new trial on damages because we are unable to discern a reasonable explanation for the jury's wide-ranging verdicts under the three claims, especially after the major portion of damages under the tortious interference claim has been invalidated.

I

As we review the district court's decision to overturn a portion of the jury's verdict and the City's challenge to the remainder of that verdict, we examine the facts in the light most favorable to VIP and the jury's verdict.

VIP, a cable television business formed to supply cable services to apartment complexes in north Dallas, began operating in August 1979. VIP installed satellite dish

antennae (earth stations) on the premises of various apartment complexes and, through underground cables, transmitted the satellite signals received by the satellite dishes to individual apartments. Each satellite dish served the host complex as well as neighboring but separately owned apartment complexes. The cables crossed private property lines but none of VIP's systems utilized City property or public rights of way. Because VIP operated entirely on private property, it did not obtain a cable television franchise from the City. VIP built five separate cable television systems, each with its own satellite dish, which served 28 apartment complexes and approximately 2,000 subscribers and had the potential to reach 6,000 subscribers.

In October 1980, VIP applied to the Federal Communications Commission ("FCC") for a permit to construct a cable television relay service ("CARS") station, which the FCC granted. The CARS facility would enable VIP to link its several cable television systems to transmit locally produced programs and to increase substantially its ability to establish additional cable systems in apartment complexes.

At approximately the same time that VIP had commenced its operations, the City began negotiations concerning a cable television franchise in the City. In October 1979 the City voted to franchise one cable operator for the entire city, and the City council, on November 5, 1980, awarded the franchise to WAX. WAX was given the right to operate the cable television network within the City, and in turn the City was to receive a five percent per annum franchise fee. The franchise is essentially the right to use public streets and rights-of-way for equipment installation.

The franchise agreement which the City reached with WAX contained a provision ("Section 7") that stated: "No CATV system shall be allowed to occupy or use the

streets of the city or be allowed to operate within the City without a CATV franchise." The franchise agreement defined "CATV system" as:

> a system of antennas, cables, wires, lines, towers, waveguides, or other conductors, converters, equipment or facilities, designed and constructed for the purpose of producing, receiving, transmitting, amplifying and distributing, audio, video and other forms of electronic or electrical signals, located in the City. *This definition shall not include any facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management, and does not use City rights-of-way.*

Section 1.b (emphasis added). Pursuant to these provisions, building permits that the City issued to non-franchised cable companies subsequent to reaching the franchise agreement contained restrictions which earlier building permits had not contained. Silver Screen, a competitor of VIP, obtained a building permit two days after the adoption of the franchise agreement which stated that the antennae could not serve outside the apartment complex where it was being installed, and that Silver Screen could not charge the tenants it served without obtaining a City franchise. Afterwards, building permits issued to VIP contained similar restrictions, or such restrictions were written onto approved blueprints.

Silver Screen challenged the City's ability to impose such restrictions on cable companies that did not have a franchise. At a public hearing before the City Board of Adjustment on February 24, 1981, Silver Screen's attorney argued that the City could not require a franchise if the system did not use or cross public streets or rights-of-way. The City's chief zoning inspector testified: "We [the City] feel that a corporation coming in and making these installations is a commercial enterprise and would

constitute a commercial business in an MF-1 zoning district." Silver Screen, however, wished only to relieve itself of the restriction against charging for its services; its system apparently did not cross private property lines.

At its March meeting, the City announced that the Building Inspector's office had abandoned its claim that Silver Screen could not charge for its services. Thus, Silver Screen obtained all the relief it sought. The chief zoning inspector persisted in his position, however, and was given approval of the interpretation of the zoning code that cable services could not cross public rights-of-way *or* private property lines. This interpretation was apparently based upon the categorization of cable facilities as commercial, which would then require them to fit within the "accessory use" provision of the Dallas City Code to be allowed in a residential area. An accessory use is a "use customarily incident to a main use." One of the requirements of the accessory use provision is that the thing in issue must be located on the same lot as the main use (in this case, the apartment complex it serves), and must not be across a street or alley from the main use. Dallas Development Code Sec. 51-4.217(a).

A month after the Board of Adjustment adopted this interpretation of the zoning code, Silver Screen's attorney proposed a modification to the accessory use provision to allow nonfranchised cable systems that did not cross public streets to serve separately owned apartment complexes.

There is evidence in the record of numerous telephone calls and meetings among City officials and with representatives of WAX prior to the May 18 hearing on the proposed zoning amendment. WAX representatives informed the City that they believed the proposed amendment would amend Section 7 of the franchise agreement. At the hearing before the Zoning Ordinance Advisory Committee ("ZOAC"), which makes recommendations on

proposed zoning amendments, both the City official in charge of administering the franchise and an attorney from WAX testified against the proposed amendment. The WAX attorney argued that the proposed amendment would violate WAX's understanding with the City. He also noted that nonfranchised systems did not pay the City the five-percent fee as WAX did, and that they were not subject to WAX's programming restrictions. The City official testified that the amendment would allow commercial ventures in residential zones, and that nonfranchised operators would not be subject to the duties placed on the franchisee. ZOAC unanimously decided to recommend against adopting the proposed amendment.

During this time, WAX also began to compile a file on VIP's north Dallas cable business. WAX determined that VIP had a sophisticated system with the CARS license and its subscription list was limited only by the capital to expand the system. After this determination, WAX executives obtained a copy of VIP's CARS license from the FCC and then met with City officials concerning VIP. WAX executives asked City officials to investigate VIP's zoning violations further. In July an article appeared in Cablevision Magazine regarding VIP's business and its threat to WAX. After reading the article, a WAX executive called City officials and discussed VIP's business. WAX then issued a memorandum to City officials regarding possible right-of-way violations that VIP had committed. The memo concluded "a meeting has been scheduled for 10:00 AM on July 31 in the city attorney's conference room to discuss the implications and possible courses of action to take with respect to the operation of VIP in Dallas." VIP was not invited to any of the meetings. During the following weeks, WAX and the City contacted each other several times concerning VIP's operations and possible zoning violations. On August 24 another article concerning VIP appeared in MultiChannel News and indicated that a long-time WAX

competitor, the Campbell Family Partnership, was attempting to buy VIP's business. The article included a statement by one City official that "Warner-Amex and our office have been discussing [VIP] for some time." On September 2 the City council, upon a request by WAX, granted WAX permission to provide cable service to north Dallas, three years ahead of WAX's franchise schedule. On September 3, an executive with WAX informed its national office that the City had delivered zoning violations to twenty-three apartment complexes served by VIP. On September 4, WAX filed a petition with the FCC in opposition to VIP's request to transfer its CARS license to the Campbell Family Partnership which was attempting to buy VIP at the time. In WAX's petition, it noted that the City had issued zoning violations to VIP. The sale of VIP stock to the Campbells was set to close on September 16 and the City actually served the violation notices on September 11. The apartment owners and VIP were given fifteen days to remove VIP's cables. The basis upon which the City relied for citing VIP was section 51-4.217 of the City code, which required that accessory uses be located on the same lot as the main use. The City interpreted this to mean cables could not cross private property lines. VIP, in a letter dated September 14, informed the City that the notices of violations were illegal and demanded that they be withdrawn by September 15. It also informed the City that the company's business was scheduled to be sold on September 16 and that the City was impairing VIP's ability to close the sale with the Campbell Family Partnership. On September 15, the Campbells' attorney informed VIP that they could not purchase VIP's business because of the City's zoning citations. VIP subsequently shut down its operating system for a few days. VIP shortly re-started its system, and then began negotiating with the Campbells again and entered into an agreement to sell all of its assets to the Campbells in return for the Campbells assuming VIP's liabilities. The

difference between the price the Campbells paid for VIP's assets in October and the price that they had agreed to pay for the corporation's stock in August was $1.245 million.

After taking over VIP, the Campbells reactivated the system and the City filed suit against Campbell. On June 8, 1982, the City filed a motion for a nonsuit requesting that the case be dismissed because they no longer wished to prosecute the Campbells. That motion was granted and the City subsequently amended Section 7 of the franchise agreement to remove the provision that no unfranchised cable system would be permitted to operate in the City.

II

VIP sued the City and WAX for alleged antitrust and section 1983 violations, and tortious interference with the contract between VIP and Campbell Family Partnership. At trial, the jury found for VIP on all three claims and awarded damages as follows: $0 for antitrust violations; $200,000 compensatory damages and $2.5 million in punitive damages for section 1983 violations; and $1.245 million in actual and $500,000 in punitive damages for tortious interference with contract for potential plaintiffs Frank Parrish and Jack Weiss. (Parrish and Weiss did not join the suit as plaintiffs and the defendants objected to the award of damages for tortious interference with contract because VIP was not a party to the contract in question. VIP then sought to add Parrish and Weiss as partners in this lawsuit.)

WAX and the City then moved for judgment notwithstanding the verdict, and VIP moved for judgment on the verdict and for a new trial on the issue of damages for the violations of the antitrust laws. The district court found that WAX's actions were protected by the first amendment right to petition the government (*Noerr-Pennington* immunity), that there was sufficient evidence to support the jury's finding that the City had

violated VIP's first amendment right to free speech (section 1983), and that the City had not tortiously interfered with VIP's contract because it did not have the requisite knowledge of the contract. The district court did not directly address the City's antitrust liability, probably because of the zero damage award under that theory. In its discussion of WAX's liability and the *Noerr-Pennington* doctrine, however, the district court reasoned that there was insufficient evidence to find an illegal conspiracy between WAX and the City. Thus the court held that VIP was entitled to recover only $200,000 of actual damages from the City, together with reasonable attorney's fees, expenses and costs of $378,194.90 under its section 1983 action. The court denied VIP all other relief.

VIP filed this appeal, arguing that WAX's and the City's actions fell within an exception to the *Noerr-Pennington* doctrine, and that the jury's verdict against WAX should stand; that the trial court erred in concluding that there was insufficient evidence that the City had knowledge of the contract to uphold the jury's verdict on tortious interference with a contract; that the damages the jury awarded were not duplicative and that VIP is entitled to a new trial on the issue of antitrust damages; and that VIP is entitled to prejudgment interest.

The City cross-appealed, arguing that the district court lacked jurisdiction; that the City had not deprived VIP of any constitutional right to support a section 1983 claim; that the contract interference claim must fail because it was instituted by the wrong party; that a city cannot be liable for common-law intentional tort or punitive damages; that VIP had not proved various elements of its contract interference claim; that VIP had not suffered damages and had, in any event, failed to mitigate damages; that VIP was not entitled to attorneys' fees; that *Noerr-Pennington* protected the City as

well as WAX; and that the City was immune from damages under the Local Government Antitrust Act of 1984.

III

To aid the analysis in this case, we think it helpful to lay out the basic scenario that VIP claims underlay the actions of WAX and the City:

WAX and the City included section 7 in the franchise agreement in order to exclude other cable companies from operating in Dallas without a franchise. This arrangement benefitted both parties since by refusing other franchises, WAX would have exclusive access to Dallas customers, and the City would receive a five percent annual fee on all of WAX's business that it would not receive on the business of unfranchised cable companies.

At some stage, it became clear that the City did not have authority to require a franchise of cable companies that did not use public streets or rights-of-way to string their cables. It is not clear when the City and WAX realized this, but on appeal they concede this fact. It is the crossing of public ways that gives the City the right to require a franchise. *West Texas Utilities Co. v. City of Baird*, 286 S.W.2d 185 (Tex. Civ.App—Eastland 1956).

According to VIP, when WAX and the City realized that they could not require a franchise of cable companies whose lines did not cross public streets, they began searching for another way to accomplish the same goal. Between WAX and the City, they devised a theory under the zoning law that satellite dishes were commercial and thus had to fit within the "accessory use" provision of the zoning code. The dishes, therefore, could serve only those complexes where they were installed. VIP's scenario requires the inference that this categorization of satellite dishes as "commercial" was a means to accomplish the illegal goal in the franchise

agreement. As we analyze the individual issues in this case, we will consider both whether the jury had sufficient evidence to support VIP's scenario and whether this scenario, if proved, fulfills the requirements of the various claims.

A.

We turn first to discuss the applicability in this case of the *Noerr-Pennington* doctrine, and the exceptions to that doctrine. WAX argues and the district court found that this doctrine protects WAX's activities from liability. VIP responds that the "co-conspirator exception" to the doctrine applies to WAX, and that the doctrine therefore does not shield WAX from antitrust and other liability.

The *Noerr-Pennington* doctrine and the exceptions to it grew from two Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The essence of the doctrine is that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent. Thus, railroads that embark on advertising campaigns designed to convince the legislatures to pass laws detrimental to the trucking industry are not subject to antitrust liability for those actions even though their ultimate goal is to drive truckers out of business and limit competition. Similarly, "petitions" made to the executive or judicial branches of government, e.g., in the form of administrative or legal proceedings, are exempt from antitrust liability even though the parties seek ultimately to destroy their competitors through these actions.

Possible exceptions to this doctrine were first noted in *Noerr* and *Pennington* and have since developed more

fully. Our reading of both the law in general and the briefs in this case indicates that there is a substantial amount of confusion over the extent of and distinction between these exceptions. We will thus explain our interpretation of these exceptions based upon their purposes.

Much of the confusion surrounding the doctrine and its exceptions arises from the lack of a definition of, and distinction between, two separate exceptions: the "sham" exception and the "co-conspirator" exception. These two separate ideas are often confusingly interchanged in the case law, and therefore also in the parties' briefs. Nonetheless, we discern these two ideas as separate and deriving from slightly different policy objectives.

The "sham" exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that "petitions" the government by engaging in administrative processes only to preclude or delay its competitor's access to those processes may be liable for antitrust damages under the "sham" exception. There is much debate about how a court can tell when a petition is not genuine. We need not busy ourselves with this problem, however, since it is apparent that, despite frequent referral to it by the briefs and the courts below, the "sham" exception does not apply in this case. WAX petitioned City officials to obtain and/or maintain a certain interpretation of the zoning code. WAX's intent was to obtain that interpretation, not to prevent VIP's gaining access to government or waste VIP's resources in fighting the interpretation. This finding is supported by the fact that WAX succeeded in attaining its goal of a zoning code inter-

pretation that prevented cables from crossing private property lines. Although on its own such success might not be sufficient to prove that the petitioning activity is not a sham, *see In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir.1987) (see both majority and concurring opinions), neither party seriously contends that WAX did not seek the end for which it petitioned.

Rather, VIP asserts that the "co-conspirator" exception to the *Noerr-Pennington* doctrine may apply even when the petitioner actually seeks the object of its petition. We agree that although sometimes a sham petition may coincide in a case with an illegal conspiracy with government officials, it need not always do so, and it is the illegal conspiracy that is the essence of this second exception to the *Noerr-Pennington* doctrine. We must thus examine whether such an illegal conspiracy existed between WAX and City officials sufficient to activate the co-conspirator exception.

Our reading of the cases involving the "co-conspirator" exception demonstrates that this exception has been applied in cases where a government official or body has been influenced by the petitioner through some corrupt means. *See, e.g., Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir.1984). Although WAX argues that the exception will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception.

The case before us presents a new twist. In this case, the officials may have perverted the zoning regulations for a purpose other than that for which it was intended.

It was not in any way a personal or selfish purpose, however; rather, it was to further the best interests of the City. That is, the City shared with WAX a desire to reduce the business of other cable companies and increase that of WAX. This mutual goal arose because the City received a five percent franchise fee from WAX that it did not receive from the other companies. The City thus had an incentive to seek out and enforce laws against other cable companies that would result in decreasing their share of the cable business and increasing WAX's share.

We will consider the propriety of the City's enforcement later in this opinion; however, we think the propriety of the City's motives is irrelevant in evaluating WAX's liability for encouraging the City to enforce its zoning code.

The point of the *Noerr-Pennington* doctrine is to protect private parties when they petition the government for laws or interpretations of its existing laws even though those private parties are pursuing their goals with anticompetitive intent. To hold WAX liable because the City itself had anticompetitive intent for its own economic reasons would place too great a burden on WAX's first amendment right to petition the government. In such a case, WAX would not only have to discern the City's true motives before petitioning for its zoning interpretation, it would have to withhold its petition altogether if it determined that the City might act on it for anticompetitive reasons. Otherwise, the submission of the petition alone might subject WAX to antitrust liability if it were ultimately determined that the City acted for the anticompetitive reasons it shared with WAX and that it had no zoning interest upon which to base its enforcement. The fact that in this case the City may have shared WAX's anticompetitive intent does not remove the protection of the *Noerr-Pennington* doctrine from WAX's lobbying activities.

VIP has not demonstrated any evidence of personal corruption or other venal motive on the part of the City officials who supported WAX's petitions. WAX cannot be liable, therefore, for exercising its first amendment right to petition the government. The district court correctly excused WAX from antitrust liability in this case.

Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations. *See, e.g., Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980), and cases cited therein. We find it easy to agree that the same rationale under antitrust law that supports WAX's petitions to the City also serves to protect WAX from the tort claim. There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.

The section 1983 claim presents more difficulty, although we ultimately arrived at the same result. The difficulty arises from the fact that section 1983 itself protects constitutional rights, so our reasoning must involve a more careful balancing of interests. In order for a private party to be liable under section 1983, it must have acted under color of state law. WAX's first amendment petitioning of the City does not constitute action under color of state law unless WAX acted as a co-conspirator with the City in violating Video's constitutional rights. *Dennis v. Sparks*, 449 U.S. 24, 26, 101 S.Ct. 183, 185, 66 L.Ed.2d 185 (1980). It is true that the evidence here supports the skeletal elements of a conspiracy between the City and WAX, that is, an agreement to accomplish an alleged illegal object and acts in furtherance of that object. But the Supreme Court noted (in the context of petitioning a court for an injunction),

"merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.* at 28, 101 S.Ct. at 186. The element in *Dennis* that converted the private actors into co-conspirators acting under color of law was that they engaged in a "*corrupt* conspiracy involving bribery of a judge." *Id.* at 28, 101 S.Ct. at 186 (emphasis added). As we have already concluded, there is insufficient evidence here to support the theory of a corrupt conspiracy that would deny WAX the protection of the *Noerr-Pennington* doctrine. We think that if *Noerr-Pennington* is to have its intended effect at all, an analysis of whether the petitioner is a co-conspirator under section 1983 must parallel the co-conspirator exception with *Noerr-Pennington.* This conclusion is fully consistent and consonant with the language of the Supreme Court in *Dennis* ("private parties who *corruptly conspire* with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases"). *Id.* at 29, 101 S.Ct. at 187 (emphasis added). Otherwise, first amendment petitioning could be challenged in the section 1983 context as a denial of equal protection, a taking of property without just compensation, a first amendment violation, or other constitutional claim, thus vitiating *Noerr-Penningon* protection. Further, we believe that the equation of section 1983 state action with the *Noerr-Pennington* co-conspirator exception sufficiently guards those constitutional rights that section 1983 serves to protect.

Thus, we hold that any behavior by a private party that is protected from antitrust liability by the *Noerr-Pennington* doctrine is also outside the scope of section 1983 liability. To hold otherwise would effectively cast a cloud over a broad range of causes that are brought before courts, legislatures, or governmental agencies. For these reasons, the district court correctly excused WAX from section 1983 liability in this case.

B.

We next address whether the City can be held liable for tortious interference with a contract under Texas common law. The contract in question is that between the shareholders of VIP and Campbell Family Partnership to sell VIP. The jury found both the City and WAX liable for $1.245 million compensatory and $500,000 punitive damages. The district court overturned the jury's verdict in regard to WAX's liability, because it was again covered by the *Noerr-Pennington* doctrine. As to the City, the district court found there was insufficient evidence to show that the City had the requisite knowledge of the existence of the contract with which it had allegedly interfered. We agree with the district court that WAX is protected by the *Noerr-Pennington* doctrine. Although we are less certain that the jury lacked sufficient evidence upon which to find that the City had knowledge of the contract, we do not reach this issue since we find that the City's sovereign immunity prevents VIP's claim of tortious interference with a contract.

Under the Texas Tort Claims Act (Tex. Civ. Prac. & Rem. Code §§ 101.001, *et seq.* (Vernons 1986)), the City is not liable for intentional torts, and contract interference is such an intentional tort. *Tippett v. Hart*, 497 S.W.2d 606 (Tex. Civ. App.—Amarillo 1973, *writ ref'd n.r.e* 501 S.W.2d 874 (Tex. 1973). Furthermore, we need not address VIP's contention that the City failed to raise its immunity in the district court, since "[W]hen the judgment of a district court is correct, it may be affirmed for reasons not given by the court and not advanced to it." *Laird v. Shell Oil Co.*, 770 F.2d 508, 511 (5th Cir. 1985).

VIP argues that the City does not have sovereign immunity when it is performing a proprietary rather than a governmental function. The law is settled that a city's

enforcement of its zoning code is an exercise of its police powers, a governmental function. *City of West Lake Hills v. City of Austin*, 466 S.W.2d 722, 726 (Tex.1971); *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970); *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W.2d 475 (1934).

VIP's complaint in this case arises from the City's enforcement of its zoning code, including sending out zoning violation notices which had the effect of impeding the expansion and continuation of VIP's business. These actions were clearly taken within the City's governmental-police power authority. VIP argues that the City was performing a proprietary function because of its relationship with WAX in the franchise agreement. First, however, it is clear that the actions of which VIP complains were taken pursuant to the City's zoning authority. Second, we do not think that a five percent franchise fee for a service rendered to the citizens by a private company places the government in a proprietary capacity even if the government were acting as administrator of the franchise in the actions of which VIP complains, which it was not.

C.

(1)

VIP next contends that it is entitled to a new trial on the issue of antitrust damages. Although the jury found that the City and WAX were liable under the antitrust theory, they allotted zero damages to this claim. We have struggled to follow the Supreme Court's admonition to search for a view of the case that makes the jury's answers to special interrogatories consistent, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962), but we can find no view that reconciles the jury's damage awards under the section 1983 and contractual-interference tort claims with the zero damage award under the antitrust claim.

VIP tried this case as one set of facts demonstrating a single injury for which the jury could find liability under any one or all of three theories. VIP argued that it was injured by an agreement between WAX and the City that led to the issuance of the zoning violations and affected the value of VIP's business, and that this set of facts demonstrated violations of antitrust, civil rights (equal protection, due process and free speech) and Texas tort laws. The case was not presented, tried, or argued as one in which discrete damages had been suffered under each claim. Although liability arguments under each theory may have been advanced on different parts of the evidence, it seems clear that damages under each theory rested on identical facts, that is, the loss of business and customers because of the City's application of its zoning laws as reflected by VIP's loss in revenues and value between the first and second contracts of sale to the Campbells. Thus, one would expect the jury's respective damage awards to be virtually the same. The jury's lopsided apportionment of damages therefore makes us think it likely that the jury decided the total amount it wished to award and apportioned it *among* the theories, rather than awarding duplicative damages on each separate theory in approximately the same amount. We would be less concerned that the jury divided its total damage award inconsistently among the theories if the district court (and we) had not eliminated the damage award under the claim for tortious interference with contract. It was under that theory that the jury awarded VIP the major part of its damages, and now we have eliminated that portion of the award. Because we are most uncertain, and the parties offer little plausible explanation, why the jury allotted zero damages for antitrust violations and a major sum for contract interference when both theories are supported by the same set of facts, we think equity requires that VIP should have another chance before the jury to prove whether, under the re-

maining two theories, VIP is entitled to greater damages than it would receive with the tort claim eliminated and no remand. Furthermore, as we have indicated, damages under the section 1983 claim are based upon identical facts as the antitrust and contract-interference claims and yet the jury returned a verdict of only $200,000. Because we are remanding on damages based upon the confusing conflict among the various awards, we think it necessary to remand for damages on both remaining theories, that is, section 1983 and antitrust, to allow the new jury to write on a clean slate, and to avoid possible duplication and other confusion.

(2)

This holding, of course, is based upon the fact that the jury did find that WAX and the City were liable for antitrust and civil rights violations. As previously explained, however, WAX cannot be held liable under either issue. The City's arguments that *Noerr-Pennington* protects it from antitrust liability fail, however. There was sufficient evidence for the jury to determine that WAX and the City were engaged in anticompetitive activity in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. In particular, the jury reasonably could have read the evidence to indicate that the City and WAX had agreed to restrain the competition posed by VIP and other similar companies and, in furtherance of this agreement, the City had manipulated the zoning ordinances to eliminate such competition. WAX, however, is protected by its position as a private party petitioning the government. *Noerr-Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment.

The City argues, however, that equity demands that the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1985 Supp.), which protects local governments com-

pletely from liability for antitrust damages, should apply retroactively. We leave this question to the district court which did not address it, because one of the factors that needs to be considered in determining the propriety of retroactive application is the financial harm a treble damage award could inflict on a municipality and its taxpayers. 130 Cong.Rec. H.12, 187 (Daily Ed. Oct. 11, 1984) (remarks of Rep. Fish). Until the jury has determined the damage award under the antitrust theory, we have no way of evaluating the harm to the municipality. Once the damage award has been determined, the district court may then evaluate the City's claim that the Local Government Antitrust Act of 1984 should apply retroactively.

D.

VIP's arguments as to prejudgment and postjudgment interest are moot now that we have set the judgment aside.

IV

A.

Turning to the issues in the City's cross-appeal, we deal first with its arguments about the section 1983 claim. Many of the City's arguments relating to this claim revolve about the City's contention that it never reached a final decision regarding VIP's zoning problems because VIP did not bring its complaint to the highest authority, that is, the Board of Adjustment, for a final interpretation. We disagree that there was no "final decision" cognizable under section 1983. The building inspector had requested and received the Board of Adjustment's interpretation of the zoning code during the Silver Screen case. He had clearly made this request for guidance in his duties. According to the City, the Board of Adjustment *is* the final decision making authority on these issues. Thus, the building inspector was acting pursuant to his authority from the Board in sending out the zoning

violations. *See Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir.1984). The combination of the zoning policy decision by the Board and the issuance of the violation notice by the highest City official empowered to execute it, resulted in a policy decision that can be attributed to the City. *St. Louis v. Praprotnik*, —— U.S. ——, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). The fact that VIP could appeal for a possible variance, or could urge the Board to reconsider and change its prior expressed policy, does not render nonfinal the decision made pursuant to and in accordance with established policy. Furthermore, we agree with the district court that, as part of the first amendment violation, the building inspector's sending of zoning violation notices to VIP and all of its customers (without prior warning or notice to VIP) and informing them that they had fifteen days to cease use of the cable system gave the jury sufficient evidence to determine that this City action caused an immediate chilling effect on VIP's first amendment rights, as evidenced by the fact that numerous customers were understandably upset and informed VIP promptly that they wish to cease receiving its service. The building inspector was clearly the final authority in regard to the decision to implement established policy by sending out the violation notices. There was no effective appeal that could retract the effect that those notices had upon VIP's business and freedom of speech.

The City's argument that VIP could have applied for a variance does not affect the fact that the zoning violation notices were issued pursuant to City policy with immediately resulting injury to VIP. As to damages, the jury was entitled to conclude that VIP's decision to shut down its operations for a few days was a reasonable reaction to a notice requiring it to shut down its operations, and that it may have taken some time for VIP to realize the extent of its options. When the jury considers damages on remand, it should consider whether

VIP could have mitigated damages by applying for a variance to the Board of Adjustment.

There was also sufficient evidence to support the jury's section 1983 verdict on the first amendment theory, since the jury could reasonably have found that the City's actions failed to satisfy the test for time, place and manner restrictions of speech, within the meaning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Pursuant to this authority, the City had to demonstrate *both* that the restraints furthered a substantial government interest and that they allowed reasonable alternative avenues of communication. *Id.*, 106 S.Ct. at 928. We need not decide the first prong of this test, whether the zoning regulation in this instance furthered any substantial governmental interest, since the restraint on Video's speech failed the second prong. The jury was justified in finding that the City's abrupt issuance, without notice to VIP, of zoning violation notices to it and all of its customers did not leave reasonable alternative avenues of communication. We need not address the question whether the avenues need be commercially viable, since in this case VIP's initial notice required it to shut down within fifteen days. Clearly the jury was entitled to find that, at least for a short time, VIP's free speech was paralyzed, and also to find that VIP may have suffered long-term damages as a result of this temporary paralysis.

We repeat that on remand of the issue of damages, the jury should be instructed about mitigation of damages and be allowed to evaluate whether VIP's failure to pursue the City's avenues for relief from established policy meant that the City is not liable for the entire amount of VIP's losses between the first contract to sell and the second. On retrial, the district court should also take care to assure that the damages that the jury awards under section 1983 are not duplicative of any awarded under the antitrust claim, and should render judgment accordingly.

We agree with the district court that we need not examine the other constitutional claims (taking, equal protection) that VIP asserted to support its section 1983 claim. The first amendment violation is sufficient to support the jury's finding of liability. We are, however, for reasons we earlier noted, remanding the case for an entirely new trial on all damages, including those attributable to this section 1983 claim.

B.

We believe that the explanations above make it clear that the jury was entitled to infer that the City's conduct was the proximate cause of VIP's injuries. The City offers other reasons why VIP's stock value may have declined, but it does not sufficiently exclude the jury from concluding that the City's own actions, including its arrangements with WAX, its interpretation of the zoning code, and its issuance of violation notices to VIP and its customers, played the predominant and major role in that decline.

The City also argues that the only evidence of any damages suffered was the $1.245 million, which was the difference between the contract for sale of VIP before and after the zoning violation charge. The City argues that this amount was lost by Parrish and Weiss, VIP's stockholders, not VIP itself. It further argues that since there is no evidence of the amount of damages sustained by VIP, it is not entitled to any actual or punitive damages. We disagree. The value of VIP's stock or assets reflects the value of the corporation, and any diminution in value represents damage to that corporation, on which it can sue. Thus, VIP may claim its compensatory damages. The City, however, is not liable for any punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981).

C.

As to the attorneys' fees awarded by the district court, the validity of the amount is moot since we have set aside the damage verdicts pending a new trial. The district court should reconsider this question after the jury renders its new award.

V

We affirm the district court's well reasoned opinion on all grounds except that we find necessary a new trial on all questions of damages for the reasons we have stated. The court's instructions on damages should include the issue of mitigation. We have noted our special concern, for example, whether, after the cancellation notices were sent to VIP's customers and before the final sale to the Campbells, VIP should have appealed the building inspector's decision to the Board of Adjustment, and, if so, whether its damages would have been reduced. The district court should consider the applicability of retroactive application of the Local Government Antitrust Act of 1984 subsequent to the jury's reevaluation of damages. The district court should also have special concern that the ultimate damages VIP receives are not duplicative. There can be no punitive damages awarded against the City, and the district court's decisions on attorneys' fees must be reconsidered after retrial. WAX, of course, is excused from all liability and all further proceedings in this case.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

GARWOOD, Circuit Judge, concurring in part and dissenting in part:

I concur in all of Judge Jolly's persuasive opinion except as it holds the City of Dallas liable under the Sherman Act and for First Amendment violations under section 1983 on account of the issuance by its building

inspection department of notices that VIP was in violation of the accessory use provisions of the Dallas Development Code. In the context of this case, such action by the City's building inspection department is not, in my view, an adequate basis on which to impose liability because it was without any legal significance and did not constitute the City's legally final determination that a zoning violation had occurred.

The City did not cut off VIP's utilities or take any kind of physical action against VIP; it did not institute suit or procure any type of restraining order; no permit or other requests by VIP were denied by the City. VIP has not explained how the notices in question constituted legally anything more than the formal expression of opinion of the building inspection department that VIP was in violation of the zoning ordinance.[1] Under the ordinances of the City, and under Texas Local Government Code, § 211.010(c), VIP could have appealed to the City's Board of Adjustment and challenged the building inspection department's construction of the accessory use provisions of the ordinance; VIP could have also thus sought a variance from the Board of Adjustment.[2] In the event of such appeal, all action by the building inspection department or other City officials would have been entirely stayed pending resolution of the appeal.[3]

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[1] Had the accessory use provision of the Dallas ordinance been construed to have the meaning which the building inspection department understood it to have, that would not have rendered the ordinance facially unconstitutional.

[2] It is true that, under Texas Local Government Code, § 211.009(c), the building inspection department's notices may have had the legal effect of requiring a four-to-one or five-to-zero vote in VIP's favor at the Board of Adjustment in order for VIP to prevail on an appeal. However, as VIP never took an appeal, this is irrelevant.

[3] Section 211.010(c) provides:

> "(c) An appeal stays all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies in writing to the board facts supporting the official's opinion that a stay would cause imminent peril to life

Although the Board of Adjustment had previously indicated its agreement with the building inspection department's construction of the ordinance in the Silver Screen case, nevertheless VIP was not a party to that proceeding, the issue was not actually presented there, and the Board of Adjustment did not have the benefit of conflicting arguments being made to it by the parties. It was not shown to be a foregone conclusion that the Board of Adjustment would adopt the same construction of the accessory use provisions of the ordinance in an appeal by VIP, or that it would deny VIP a variance. The Board of Adjustment, which is as much an agency of the City of Dallas as is the building inspection department, is the City's final authority for interpreting its zoning ordinances and granting variances therefrom. That, coupled with the lack of any relevant legal effect of the building inspection department's violation notices, renders it inappropriate to hold the City liable merely because such notices were issued. A final decision by the City, with actual concrete legal injury, was not shown to have ever occurred. *Cf. Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3120, 87 L.Ed.2d 126 (1985); *City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S.Ct. 915, 924, 926, 99 L.Ed.2d 107 (1988).

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or property. In that case, the proceedings may be stayed only by a restraining order granted by the board or a court of record on application, after notice to the official, if due cause is shown."

It is obvious in this case that the exception "imminent peril to life or property" would not be applicable.

While the Dallas Development Code authorizes the building inspection department to have utilities disconnected in case of zoning violations, the City never did this. Although its violation notice threatened to take such action after fifteen days, the fifteen-day period was sufficient for appeal to the Board of Adjustment and such appeal by its stay provisions would have prevented any such action. I also observe that under the Dallas Development Code it is a defense to prosecution that the person prosecuted is in compliance with an order of the Board of Adjustment, even if the party's action would otherwise constitute a violation.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 87-1572

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VIDEO INTERNATIONAL PRODUCTIONS, INC.,
*Plaintiff-Appellant*
*Cross-Appellee,*

versus

WARNER-AMEX CABLE COMMUNICATIONS, INC., *et al.*,
*Defendants-Appellees,*

THE CITY OF DALLAS,
*Defendant-Appellee,*
*Cross-Appellant.*

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Appeals from the United States District Court
for the Northern District of Texas

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 31, 5 Cir., 1988, —— F.2d ——)

(January 23, 1989)

Before GOLDBERG, GARWOOD and JOLLY Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

Judge Johnson did not participate in the consideration of the suggestion for rehearing en banc.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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Civil Action No. CA3-81-1772-D

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VIDEO INTERNATIONAL PRODUCTIONS, INC.,
*Plaintiff,*

vs.

WARNER-AMEX CABLE COMMUNICATIONS and
the CITY OF DALLAS,
*Defendants.*

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## MEMORANDUM AND ORDER

[Filed May 19, 1987]

Plaintiff, Video International Productions, Inc. ("VIP"), a non-franchised cable television operator conducting business in Dallas, Texas, sued the City of Dallas, Texas ("City") and Warner-Amex Cable Communications, Inc. ("WAX"), the franchised Dallas cable television operator, for alleged violations of the antitrust laws and of VIP's civil rights and for tortious interference with contract. After a trial, the jury found that VIP was entitled to recover $2.7 million in actual and punitive damages for violations of the antitrust laws. The jury also found that potential plaintiffs,[1] Frank Parrish and Jack

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[1] Parrish and Weiss did not join the suit as parties-plaintiff. On motion for directed verdict defendants correctly contended that VIP could not recover for tortious interference with contract because VIP was not a party to the contract in question. VIP then

Weiss, were entitled to recover $1.745 million in actual and punitive damages for tortious interference with contract. WAX and the City have moved for judgment NOV. VIP has moved for judgment on the verdict and for a partial new trial as to the jury's finding that VIP had incurred no damages for violations of the antitrust laws. The court concludes that WAX's actions were protected by its First Amendment right to petition the government, that the City violated VIP's First Amendment right to free speech, and that neither defendant tortiously interfered with contract. Accordingly, the court holds that VIP is entitled to recover from the City the sum of $200,000 as actual damages,[2] together with its reasonable attorney's fees, expenses, and costs in prosecuting its § 1983 action.

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sought leave to add Parrish and Weiss as parties. A number of arguments have been presented regarding whether Parrish and Weiss should be allowed to join the lawsuit after it has been pending for five years (and after VIP had rested its case in chief) and whether the court should exercise pendent party jurisdiction over a state law claim with respect to which there was not complete diversity of citizenship at the time suit was filed. Because the court concludes below that WAX's interference, if any, was the result of activities protected under the *Noerr-Pennington* doctrine and that the city did not possess the requisite knowledge of the existence of the contract, the court does not decide whether Parrish and Weiss should be made plaintiffs to this civil action.

[2] The court *sua sponte* raised the question whether *Memphis Community School District v. Stachura*, —— U.S. ——, 106 S.Ct. 2537 (1986), bars the recovery by VIP of actual damages for a § 1983 violation. Because the court concludes that the jury's award of $200,000 does not constitute an award of nominal damages, the court holds that *Stachura* does not preclude such recovery. VIP is not entitled to recover punitive damages from the City under § 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (municipality immune from punitive damages).

## I.

## BACKGROUND FACTS AND PENDING MOTIONS

### A. Background Facts

VIP, a business formed to supply cable television service to apartment complexes in North Dallas, began operating in August 1979. VIP installed satellite dish antennas (earth stations) on the premises of apartment complexes and, by means of underground cable transmitted the satellite signals received by the earth stations to individual apartments. Each earth station served the host complex as well as neighboring but separately owned apartment complexes. VIP's cable crossed private property lines but none of VIP's systems utilized city property. Because VIP operated entirely on private property, it did not obtain a cable television franchise from the City. VIP built five separate cable television systems in North Dallas, each with its own earth station, which served 28 apartment complexes and approximately 2,000 subscribers.

In October 1980, VIP applied to the Federal Communications Commission ("FCC") for a permit to construct a cable television relay service (CARS) station.[3] A CARS facility would have enabled VIP to link its several cable television systems, to transmit locally produced programs, and to increase substantially its ability to establish additional cable systems in apartment complexes. VIP became the first non-franchised cable-systems operator in the United States to receive a CARS license when the FCC granted the license on May 12, 1981.

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[3] A CARS station is a microwave transmitter which receives television signals from a satellite earth station and distributes those signals through the air by microwave to several separate cable television systems. A prerequisite for VIP's obtaining the permit was that each of VIP's systems serve apartment complexes under different ownership.

At approximately the same time that VIP commenced operations, the City was entering the final stages of determining the manner in which cable television service would be provided to City residents. In October 1979, the City Council voted to franchise one cable operator for the entire city. After one year of intense competition by would-be cable franchisees, the City Council on November 5, 1980 awarded the franchise to WAX.[4] The agreement, which was adopted as City Ordinance No. 16738, provided that no other community antenna or cable television service (CATV) would be permitted to operate in Dallas as long as WAX was the franchisee. The franchise applicants, including WAX, had to commit to abide by many conditions imposed upon them by the City, to serve all the geographic segments of Dallas within a certain time frame, and to charge City-approved rates. The chosen franchisee was also required to pay the City a 5% per annum franchise fee.

Following the 1980 award of the franchise to WAX, unfranchised operators who sought building permits to construct cable systems on private property were issued building permits that prevented charging a fee without first obtaining a cable franchise from the City Council. This restrictions was imposed upon another cable operator, Silver Screen, in November 1980 and upon VIP in December 1980. The City thereafter restricted unfranchised systems from crossing property lines with cable, even if the line did not traverse a public right-of-way. Silver Screen appealed the Building Official's[5] rul-

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[4] On April 4, 1981, City voters approved the awarding of the franchise to WAX. The election was conducted pursuant to a provision in Texas law which permits citizens to challenge, by means of an election, the awarding of a city franchise. WAX opposed the holding of the election but the City ruled against WAX and concluded that the election must be held.

[5] The Dallas Development Code provides that the Building Official is empowered to issue permits and certificates of occupancy in accordance with and to enforce the provisions of Chapter III of the Development Code. *See* Dallas Development Code § 51.3.105.

ing that Silver Screen could not charge for its service, but did not appeal the decision that it could not extend its service across property lines. The Building Official thereafter withdrew the contention that Silver Screen needed a franchise but the Dallas Board of Adjustment adopted the policy that unfranchised cable operators could not cross property lines. The effect of such a rule was to permit unfranchised operators to exist in a legal sense, but to so restrict their operations as to make them economically unfeasible.

In April 1981, Louis Nichols, a Dallas attorney who represented Silver Screen, wrote a letter to Eli Martinez, a staff member of the Zoning Ordinance Advisory Committee ("ZOAC"), a group which makes recommendations on proposed amendments to the City Plan and Zoning Commission.[6] Nichols requested an amendment to an existing Dallas zoning ordinance known as the "accessory use provision" of the Dallas Development Code, § 51-4.217, to permit cable television operators to cross property lines. The ZOAC scheduled a hearing on the proposal.

Prior to the hearing, counsel for WAX met with Martinez and Tom James, Director of Public Utilities for the City, to discuss the Nichol's proposal. James was responsible for overseeing the City's public utilities and for administering the franchise ordinance that governed WAX's cable operations. WAX urged that the Dallas Development Code not be amended. James indicated that he would oppose the adoption by ZOAC of the proposed zoning amendment and Martinez indicated that the staff would recommend against it. WAX's treatment as a "local utility" for zoning purposes was also discussed. At the hearing, ZOAC heard presentations from Nichols and James, from WAX's legal counsel, and from Martinez,

[6] The City Plan and Zoning Commission serves as an advisory board to the City Council concerning amendments to zoning ordinances.

who presented the staff recommendation. ZOAC voted unanimously not to recommend amending the zoning ordinance. ZOAC's determination was consistent with an earlier interpretation of the "accessory use provision" by the Board of Adjustment during its review of Silver Screen's building permit application.

Shortly thereafter, Richard Davis, president of WAX, visited Frank Parrish, president of VIP. Parrish described VIP's business to Davis, including the grant of the CARS license. After meeting with Parrish, Davis discussed VIP and its operations with his superiors in New York.

Later, Davis met with James and provided him copies of VIP's application for the CARS license and of the FCC decision granting the license. Davis told James that WAX thought VIP was violating the zoning ordinance by crossing property lines with its cables and suggested that James investigate the matter. Several days after this meeting James spearheaded an investigation of VIP's systems.

In late July, Davis and James read an article in *Cablevision*, a cable television trade magazine, which suggested that VIP had the potential to reach a vast number of subscribers in the Dallas market. James sent a memo to the Building Official, Tom Jones, setting forth his belief that VIP was violating the provision of the Dallas cable franchise which forbade the operating of a cable television system without a franchise. A meeting was convened to discuss VIP and its operations. The meeting was attended by Jones, his assistant, Sam Harting, and Chief Zoning Inspector Ray Couch. The policy which had been announced by the Board of Adjustment in the Silver Screen case was given further definition. VIP's earth stations were categorized as commercial television transmission stations as defined in Dallas Development Code § 51-4.202(6) because cables from the each stations

crossed property lines. James requested that the Building Inspector investigate the matter.

During the course of the Building Inspector's investigation, counsel for WAX contacted James from time to time to check on the status of the investigation. James advised WAX's counsel that he believed the City would issue citations if cables running from VIP's earth stations were crossing property lines. The Building Inspector ultimately determined, as a result of the investigation, that VIP's cables were crossing property lines in violation of the "accessory use provision" and that VIP was illegally operating a commercial radio or television station within a residential area. The City subsequently issued citations to VIP and certain apartment complex owners based on the provisions of the Dallas Development Code, §§ 51-4.217 and 51-4.202(6), prohibiting such activity.

On August 12, 1981, VIP stockholders executed an agreement to sell their VIP stock to the Campbell family. In anticipation of the stock purchase agreement, VIP applied to the FCC for authority to transfer its newly acquired CARS license to Cable Dallas, Inc., a company owned by the Campbell family. WAX opposed the transfer, principally upon the premise that VIP was "trafficking" an FCC license. WAX submitted its opposition to the FCC pursuant to FCC procedures.

On September 2, the Dallas City Council was briefed on the zoning violations allegedly committed by VIP. The ity Council instructed City officials to issue citations if VIP was in fact crossing property lines. At the same council meeting, WAX petitioned the City Council for authority to provide iterim cable service to the North Dallas area, which was then being served by VIP and other companies.[7] This authority was granted on the

[7] WAX was required by its franchise to serve this area but was not scheduled, under its construction plan, to wire North Dallas until approximately three years later.

condition that such activity would not interfere with WAX's ability to wire other portions of the city in accordance with the franchise.

In September 1981, VIP and apartment complexes receiving VIP cable television service were served with notices requiring removal, within 15 days, of the cable television facilities. The notices of violation cited §§ 51-4.202(6) and 51-4.217(a)(4) of the Dallas Development Code.

The closing of the Campbell's purchase of VIP had been scheduled for September 16, 1981. As a consequence of the issuance of the notices, the Campbells declined to close. On October 15, the Campbells contracted with Parrish and Weiss to purchase VIP's assets for $1.245 million less than they had agreed to pay for the stock. Shortly before the agreement was signed, VIP, at the request of the Campbells, ceased its operations for three days in order to comply with the zoning violation notices.

B. Pending Motions

The City moves for judgment NOV on these grounds: (1) this court lacks subject matter jurisdiction over VIP's federal claim; (2) this court lacks jurisdiction over Parrish's and Weiss' common law claims; (3) there was no final decision by the City to enforce the Dallas Development Code against VIP and, thus, no taking of VIP's property; (4) there was no taking because none of VIP's property was physically appropriated, damaged, devalued, or destroyed; (5) there was no decision by the Board of Adjustment to enforce the Dallas Development Code against VIP and thus no deprivation of constitutional rights caused by a City policy; (6) VIP is not the real party in interest; (7) there is no evidence that there was any restraint of VIP's First Amendment rights; (8) the City did not tortiously interfere with the stock purchase contract because there is no evidence that

the City knew of the contract; (9) cities cannot be liable for punitive damages under the Civil Rights Act, 42 U.S.C. § 1983; (10) cities have sovereign immunity against suits arising out of the enforcement of zoning regulations; (11) cities cannot be liable for punitive damages in common law tort actions; (12) there is no evidence that the City's conduct was a proximate cause of VIP's damages; (13) VIP could have avoided any injury and failed to do so; (14) there is no evidence that VIP suffered any damages; (15) the jury's finding of puntive damages for civil rights violations is excessive; and (16) the jury's findings of actual damages for the civil rights claims and for the contract interference claim are duplicative.

WAX moves for judgment NOV on these grounds: (1) WAX's conduct was protected by the First Amendment and therefore WAX is not liable under the antitrust laws, the civil rights laws, or for tortious interference with contract; (2) WAX is not subject to § 1983 liability because there is no evidence that WAX was acting "under color of" state law, there was no violation of law that would serve as a predicate offense for a § 1983 claim, and WAX acted pursuant to a presumptively valid zoning law which was enforced against VIP (which law WAX neither knew nor reasonably should have known was unconstitutional); (3) WAX is not liable for tortious interference with contract because there was no evidence of knowing or intentional interterference without legal justification, all of WAX's actions were privileged under the First Amendment, and the addition as plaintiffs of Parrish and Weiss (who, rather than VIP, would have such a claim) must be denied as improper, their claim is barred by the statute of limitations, and the court lacks subject matter jurisdiction over their claim; (4) VIP, Parrish, and Weiss are not entitled to punitive damages under § 1983 or for tortious interference because there has been no showing

of actual malice by VIP and WAX is entitled to a remittitur because the punitive damages are excessive and unreasonable in relation to the actual award; and (5) WAX is entitled to judgment on VIP's Sherman Act claims because the jury found no actual damages and its fiindings of liability should be disregarded because all of WAX's actions are protected under the First Amendment.

Plaintiff, VIP, moves for judgment on the verdict and for a partial new trial as to the jury's finding that it had incurred no damages for violations of §§ 1 and 2 of the Sherman Act. VIP also seeks attorney's fees and expenses, costs, and prejudgment interest on the jury's tortious interference award.

## II.

## DISCUSSION

### A. Tortious Interference with Contract

The jury found that the City and WAX tortiously interfered with the Weiss-Parrish contract with the Capmbell family partnership. City argues that there is no evidence that it knowingly and intentionally interfered with the contract. WAX contends that its activities were protected by the First Amendment and that any act of interference was undertaken with legal justification. The court agrees.

In order for Parrish and Weiss to prevail on their tortious interference with contract claim, they must have proved, among other requirements, that defendants knowingly and intentionally interfered with a valid existing contract. *Marcus, Stowell & Beye Government Securities, Inc. v. Jefferson Investment Corp.*, 797 F.2d 227, 235 (5th Cir. 1986) (Texas law); *Armendariz v. Mora*, 553 S.W.2d 400, 404 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.). In order to prove knowledge, the evidence must establish that the City had actual knowledge of the contract in question or knowledge of facts and cir-

cumstances that would lead a reasonable person to believe that the contract existed. *Steinmetz & Associates, Inc. v. Crow*, 700 S.W.2d 276, 277-78 (Tex.App.—San Antonio 1985, writ ref'd n.r.e.).

The evidence at trial established that, in July 1981, Public Utilities Director James read an article in *Cablevision* magazine which reported that VIP was "in the process of being sold to a top MSO." Weiss and Parrish assert that a person could reasonably have inferred from this information that "there was some sort of contractual relationship" and thus the City had sufficient knowledge to meet the knowledge element of the tort of interference with contract. The court disagrees.

Although actual notice includes knowledge of all facts that a reasonable inquiry would have disclosed, the duty of inquiry extends only to those matters fairly suggested by facts really known. *Steinmetz*, 700 S.W.2d at 280. Circumstances that merely arouse a reasonably prudent person's suspicions are insufficient to charge notice. *Id.*[8] The phrase "in the process of" connotes an incomplete transaction in which the absence of a final contract is equally as plausible, if not more so, than a completed contract. Further, the article in question does not identify the "top MSO." Absent other evidence showing the MSO was the Campbell family, there is no basis in the trial record for concluding that the City had actual knowledge of the contract. Nor, from this sketchy reference, would the City have been under a duty to inquire into the details of the contract, assuming the City could have surmised from the magazine blurb that a contract existed.

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[8] There is a difference between suspicion and knowledge. Suspicion is doubt, an absence of trust. Knowledge is a clear perception of fact, an awareness of truth. "Suspicion and conjecture or surmise based upon it is not knowledge or means of knowledge." *Steinmetz*, 700 S.W.2d at 280. The realm of suspicion and conjecture based upon it do not fall within the bounds of implied knowledge. *Id.*

Thus, the court holds that the evidence points so strongly and overwhelmingly in favor of the conclusions (1) that the City had no knowledge of the contract, and (2) that the matters fairly suggested by facts really known would not have disclosed such knowledge upon reasonable inquiry, that reasonable jurors could not have arrived at a contrary verdict. *See Knight v. Texaco*, 786 F.2d 1296, 1298 (5th Cir. 1986) (judgment NOV standard). Accordingly, the City is entitled to judgment notwithstanding the verdict with respect to the tortious interference with contract claim.

WAX argues, *inter alia*, that its activities were protected by the First Amendment. Under Texas law the act of interference must be without legal rights or justifiable cause. *State National Bank v. Farrah Mfg. Co.*, 678 S.W.2d 661, 689 (Tex.App.—El Paso 1984, writ dism'd). For the reasons set forth below, the court agrees with WAX that any interference was legally justified and, accordingly, grants WAX's motion for judgment notwithstanding the verdict.

B. *Noerr-Pennington* Doctrine

The jury found that WAX violated the Sherman Act, violated VIP's civil rights, and tortiously interfered with contract. WAX does not contest that it opposed a proposed zoning law ordinance that would have benefited operators like VIP, that it petitioned public officials to enforce the zoning laws against VIP, that it petitioned the City Council for approval to provide cable television service to North Dallas in order to compete with VIP, and that it opposed VIP's application to transfer its CARS license. WAX does contend that such actions constitute legitimate petitioning and lobbying activities which are at the very core of the First Amendment right to petition the government for redress of grievances and, as such, were protected by the First Amendment from antitrust, § 1983, and tortious interference liability.

Any claim founded upon alleged wrongful conduct arising out of lobbying activities faces a threshold conflict with the constitutionally protected rights of petition and assembly. The right to petition for redress of grievances is "among the most precious of liberties safeguarded by the bill of rights." *United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983); *see also United Mineworkers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). Inseparable from the other rights entrenched in the First Amendment, the right to petition the government occupies a "preferred place" in our system of representative government, and enjoys a "sanctity and a sanction not permitting dubious instructions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The right to petition is logically implicit in and fundamental to the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

In various contexts, courts have held defendants constitutionally immune from liability for exercising their right to petition. *E.g.*, *Hylton*, 710 F.2d at 1106 (the filing of a legitimate criminal complaint with local law enforcement authorities constitutes an exercise of constitutional right to petition for redress of grievances notwithstanding that trespass complaint may have been motivated by desire to impede IRS agents' investigation or that agents' conduct may have been privileged or immunized); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-46 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) (42 U.S.C. § 1985(1)) (irrelevant to applicability of right to petition the government that its exercise might have the effect of causing professional harm to official about whom complaints are made or even that complainant may be aware of or pleased by the prospect of such injury); *Sawmill Products, Inc. v. Town of Cicero*, 477 F.Supp. 636, 642 (N.D.Ill. 1979) (§ 1983) (protesting presence of plaintiff's sawmill which was thereafter shut down by town ordinance is protected activity); *Weiss v.*

*Willow Tree Civic Association*, 467 F.Supp. 803, 816-18 (S.D.N.Y. 1979) (§ 1983) (lobbying town officials *en masse* was nothing more than peaceable assembly petitioning municipal authority for redress of grievances and filing state lawsuit and an administrative complaint to oppose zoning permit, even if groundless, did not amount to abuse of process to prevent plaintiffs from responding); *Aknin v. Phillips*, 404 F.Supp. 1150, 1153 (S.D. N.Y. 1975), *aff'd*, 538 F.2d 307 (2d Cir. 1976) (§ 1983) (citizens who urged village officials to remedy noise problem not liable for officials' application of unconstitutional nose ordinance against plaintiff's discotheque); *Sierra Club v. Butz*, 349 F.Supp. 934, 938-39 (N.D.Cal. 1972) (contractual interference) (filing lawsuit and administrative appeals to halt complainant's logging operation constitutionally privileged even if motivated by malice).

In the antitrust law context, the constitutional immunity flowing from the right of petition was first enunciated by the Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). The Court concluded that the Sherman Act does not prohibit two or more persons from associating together to attempt to persuade the legislature or executive to take particular action with respect to a law that would produce a restraint or a monopoly. *Id.* at 136. Later, in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court again applied the right of petition in a case involving a successful effort to influence government administrative action. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), *Noerr-Pennington* immunity was applied to anticompetitive attempts to influence the judicial branch of government by way of litigation activities.

The *Noerr-Pennington* doctrine was designed to protect the speech and associational activities of private parties petitioning the government. Such petitioning activity by interested individuals provides the flow of information

essential to the proper functioning of our democratic institutions. The doctrine is one of statutory construction rooted in the principle that the courts will not impute to Congress an intent to invade First Amendment freedoms or hinder the mechanisms of representative democracy. *Noerr*, 365 at 137-38; *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 909 (D.Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986) (per curiam).

Although the *Noerr-Pennington* doctrine was first applied in the antitrust law context, it has since been followed to immunize First Amendment activities from liability under 42 U.S.C. § 1983. *See, e.g., Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (§ 1983 action in which private citizens who persuaded county officials to open road across plaintiff's property were entitled to First Amendment immunity although citizens had met privately with county officials and deliberately excluded plaintiff from meetings); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980) (no violation of § 1983 in lobbying for zoning amendment); *Racetrac Petroleum*, 601 F.Supp. at 914 (alternative holding on § 1983 claims that all acts of defendants which worked to plaintiff's detriment were within protections of *Noerr-Pennington* doctrine and thus immune from liability under civil rights laws); *First Nat. Bank of Omaha v. Marquette Nat. Bank.*, 482 F. Supp. 514 (D.Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981) (*Noerr-Pennington* doctrine applied to render bank immune from civil rights liability for lobbying to procure passage of legislation resulting in bank credit card plan and instituting litigation to enforce such legislation); *Sierra Club v. Butz*, 349 F.Supp. at 937-39 (contractual interference).

*Noerr-Pennington* also applies in the context of the Texas common law tort of interference with contract. As noted above, under Texas law one cannot tortiously interfere with a contract if the act of interference is under-

taken with legal right or justifiable cause. *See State National Bank,* 678 S.W.2d at 689. Conduct which is protected by the First Amendment is conduct undertaken with legal right or justifiable cause within the meaning of the Texas law of tortious interference with contract.

VIP does not appear to quarrel with the foregoing *Noerr-Pennington* principles. Instead, VIP argues that *Noerr-Pennington* protection does not apply because (1) the actions that WAX succeeded in inducing were illegal, (2) there was an unlawful conspiracy between WAX and City officials, and (3) the absurd nature of the City's zoning interpretation was or should have been apparent to WAX. The court disagrees.

The court rejects VIP's contention that WAX's activities are not protected because WAX induced illegal action. In *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484, 1499 (5th Cir. 1985), the Fifth Circuit held that *Noerr-Pennington* protection applies where one petitions for legislation that ultimately turns out to be unconstitutional. Similarly, in the administrative context an ultimate determination that agency action sought was unauthorized by statute should not remove protection for petitioning conduct directed to the agency to obtain that action. Only where evidence shows that the defendant knew or should have known that the action he sought was improper would a court be justified in labeling his petition a "sham" not entitled to *Noerr-Pennington* protection. *Id.* at 1500. Here, the only acts of the City found to be improper are its interpretation and enforcement of the zoning law to deny VIP's free speech rights. WAX simply urged the city to enforce the law as the City had decided to interpret it. There is no evidence on which reasonable jurors could have relied to find that WAX knew or should have known that the actions it sought from the City were improper.[9]

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[9] The court also rejects VIP's contention that WAX is not entitled to *Noerr-Pennington* immunity because WAX should have known that the City's interpretation of the zoning law was "absurd."

The court also concludes that there is no factual basis in the trial record for the jury's finding [10] and VIP's contention that WAX is not entitled to *Noerr-Pennington* protection because it was a party to an unlawful conspiracy with the City. *Noerr-Pennington* does not, of course, protect activities that are not bona fide efforts to obtain government action. The doctrine does not authorize "sham" conduct, *Greenwood Utilities*, 751 F.2d at 1498, which is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor," *Noerr*, 365 U.S. at 144, and includes "vexatious litigation and unlawful conspiracies with government officials." *Greenwood Utilities*, 751 F.2d at 1498.[11] The evidence, however, points so strongly and overwhelmingly against a conclusion that WAX and the City engaged in an unlawful conspiracy that reasonable jurors could not have arrived at a contrary verdict.

That WAX entered into a franchise agreement with the City that restricted competition from unfranchised cable operators does not establish direct evidence of a conspiracy. *See Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, 612-13 (5th Cir. 1985) (taxicab company's success-

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[10] In light of the court's instruction that, absent a conspiracy, WAX's petitioning activities could not constitute a violation of the Sherman Act, the jury perforce concluded that WAX did conspire with the City in finding that WAX violated §§ 1 and 2 of the Sherman Act.

[11] In *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991, 1013 (S.D.Tex. 1981), *aff'd in pertinent part*, 735 F.2d 1555, 1567 (5th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 788 (1986), the Fifth Circuit described the sham and co-conspirator exceptions as two separate exceptions to the *Noerr-Pennington* doctrine. *Cf. Greenwood Utilities*, 751 F.2d at 1484, (co-conspirator exception subsumed in or part of sham exception). The court charged the jury in this action that "in the absence of proof of a conspiracy with government officials, Warner Amex's petitioning conduct cannot be labeled a sham." Court's Charge at 12.

ful efforts to secure from city an *exclusive* concession at airport were protected from liability by *Noerr-Pennington* doctrine, even if concession agreement was anticompetitive); *Woolen v. Surtran Taxicabs, Inc.*, 615 F.Supp. 344, 354-55 (N.D.Tex. 1985), *aff'd*, 801 F.2d 159 (5th Cir. 1986) (where evidence reflects at most mere adoption by cities of some of private defendants' proposals after close scrutiny and extensive debate by public and private entities, anticompetitive agreement was not evidence of conspiracy between defendants and cities). The evidence reflects that the award to WAX of the cable television franchise followed a year of intense competition by would-be franchisees. There is no evidence that the franchise agreement between WAX and the City was entered into other than after arms-length negotiations.

VIP suggests that certain acts by City officials demonstrate a conspiracy between WAX and VIP. Between November 1980 and October 1981 the Building Official issued permits containing restrictions on VIP's and Silver Screen's operations; the Chief Zoning Inspector requested that the Board of Adjustment apply the zoning laws to prohibit unfranchised cable companies from operating commercial television stations across lot lines in residential areas; and the City instituted a lawsuit against Cable Dallas, Inc. and its customers to enjoin violations of the zoning law. There is no evidence, however, that WAX had any unlawful contacts with the officials involved regarding these actions and proceedings or that City officials acted other than in the ordinary exercise of their official duties.

Although VIP refers to the actions of the Board of Adjustment, ZOAC, and the City Council in support of its conspiracy theory, there is no evidence of any unlawful contacts or communications between WAX and these administrative and legislative bodies. Without evidence

of unlawful contracts, the jury could not find that a conspiracy existed.

Both James and counsel for WAX opposed the Nichols amendment before the ZOAC, which rejected the Nichols proposal. This does not, however, demonstrate "an agreement [by ZOAC] to further the defendants' monopolistic goals." The evidence shows nothing more than public arguments before a public body of the City and an independent determination by that body. There was no evidence that ZOAC was coerced, bribed, defrauded, or otherwise corrupted in any way in reaching its decision.

VIP also points to evidence of "private meetings" between WAX officials and agents and City officials, such as a June 1981 meeting between WAX president Davis and Public Utilities Director James in which James agreed to ask the Building Inspector to enforce the zoning laws against VIP. Such meetings, which WAX has acknowledged occurred, are not unlawful. In *Evers v. County of Custer*, for example, the Ninth Circuit held that defendants' acts of complaining to commissioners, attending commissioner's meetings, talking to individual commissioners about a problem while deliberately excluding plaintiff, and expressing a hostile attitude toward plaintiff at these meetings did not amount to a conspiracy. 745 F.2d at 1204.

The court concludes that WAX's conduct was protected by the First Amendment as set forth in the *Noerr-Pennington* doctrine and that the evidence is such that reasonable jurors could not have found otherwise.

C. City § 1983 Liability

The City contends the court should grant judgment notwithstanding the verdict as to VIP's speech claim [12]

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[12] Because the court concludes that VIP is entitled to recover on its restraint of speech claim, the court does not discuss the taking or equal protection predicate offenses.

because there is no evidence that VIP's speech was in fact restrained. City argues that VIP's operations were essentially unfettered and that the three-day temporary cessation of service was self-imposed by VIP. VIP responds that the issuance of the violation notices, without more, violated VIP's First Amendment rights because the notices had a "chilling effect" on the full and free exercise of such rights by VIP. The court agrees.

In *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 615 F.Supp. 916, 934 (N.D.Tex. 1985) (Robinson, J.), *appeal pending* (No. 85-1572, 5th Cir.), for example, the district court held that a labor organizer's First Amendment rights were violated by the issuance of an *ex parte* temporary restraining order, notwithstanding that the organizer obeyed the order. The holding in *Gault* is predicated on the theory, set forth in *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), and *Aebisher v. Ryan*, 622 F.2d 651 (2d Cir. 1980), that the threat of coercive power may violate First Amendment rights even though the chilling effect of the governmental action falls short of a direct prohibition against speech. This is so because the threat of sanctions may deter the exercise of First Amendment freedoms as potently as would the application of sanctions. 615 F. Supp. at 934. Here, VIP, and the apartment complexes to whom VIP provided cable television, were served with notices which stated "You are hereby notified to remove Cable TV facilities and cease illegal use within fifteen days." This action constituted a threat by the City to use its coercive power against VIP and thus effectively restricted VIP's freedom of speech.

The City argues, however, that content-neutral [13] time, place, and manner regulations on speech are acceptable

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[13] There is nothing in the record to imply that the content of VIP's programming was pornographic or obscene. The court is thus not to be understood as holding that a cable operator would have an unfettered First Amendment right to transmit such material.

so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, —— U.S. ——, 106 S.Ct. 925, 928 (1986). The jury found from a preponderance of the evidence, however, that the City's regulations did not leave to VIP reasonable alternative avenues of communication. There is no basis upon which to disturb the jury's verdict in this respect.

The City also contends that VIP cannot recover under § 1983 because there is no evidence that VIP was injured by a City policy. The City argues that the zoning notices served on VIP and its customers were issued by city inspectors who acted under the supervision of the Building official, whose decisions were, in turn, subject to review by his superiors and the City's Board of Adjustment. Under the City's theory, the Building Official's interpretation of the Code was not City policy because his decisions were subject to review and because there was no evidence that the City Council expressly or impliedly authorized the Building Official to act in lieu of the governing body. The court disagrees.

Official policy is a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmakers have delegated policymaking authority." *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984). The Dallas City Council is empowered to regulate and restrict the use of land in the city. TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon Pamp. Supp. 1987). The evidence shows that on September 2, 1981 the Dallas City Council, after a briefing on the zoning interpretation to be applied against VIP, instructed City officials to issue citations if VIP was in fact crossing property lines. This evidence is sufficient to show City policy.[14]

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[14] The City also argues that, because VIP did not appeal the zoning interpretation to the Board of Adjustment (the body em-

## III.

Having concluded that VIP is entitled to recover $200,000 in actual damages from the City, the court also concludes that VIP is entitled to recover its attorney's fees and expenses incurred in prosecuting its § 1983 action. *Brantley v. Surles*, 804 F.2d 321, 325 (5th Cir. 1986) (prevailing party may recover fees in action to enforce § 1983). The court will determine the attorney's fees award from affidavits. As required by *Nisby v. Commissioners Court of Jefferson County*, 798 F.2d 134, 137 (5th Cir. 1986), VIP's affidavits shall be in the form necessary to enable the court to make the required *Johnson* analysis. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980) ("*Copper Liquor II*"). Such affidavits and any supporting memorandum shall be filed no later than June 8, 1987.[15] The City may file a responsive memorandum and affidavit(s) if filed no later than June 22, 1987. The court will thereafter enter a judgment.

WAX's motion for judgment NOV is GRANTED. The City's motion for judgment NOV is GRANTED in part and DENIED in part. VIP's motion for partial new trial is DENIED and its motion for judgment on the verdict is GRANTED in part and DENIED in part. The mo-

---

powered to hear and decide appeals from determinations by administrative officials) there was no official interpretation of the Code with respect to the Code's application to VIP, and thus VIP was not injured by a policy of the City. The question whether the Building Official could exercise final authority is not before the court in light of the court's ruling that the City Council's action in instructing City officials to issue citations evidences City policy.

[15] VIP may simply supplement the affidavits it has already filed, but such supplementation must parse the § 1983 services from other services and must enable the court to make the required *Johnson* analysis.

tion to add Frank Parrish and Jack Weiss as parties-plaintiff is DENIED as moot.

SO ORDERED.

May 19, 1987.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
United States District Judge

## APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
600 Camp Street
New Orleans, LA 70130

February 8, 1989

GILBERT F. GANUCHEAU
Clerk

Mr. Kenneth C. Dippel
Asst. City Atty.,
1500 Marila 7BN
Dallas, TX 75201

No. 87-1572 VIDEO INTERNATIONAL PRODUCTIONS, INC.,
-vs- WARNER-AMEX CABLE COMMUNICATIONS,
INC., *et al.*, (CA-3-81-1772-4)

MANDATE STAYED TO AND INCLUDING 3/10/89

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of court but only when

the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU
Clerk

By: /s/ P. Keller
Deputy Clerk

Enclosures

cc: Mr. Brian E. Butler
Mr. Grant S. Lewis
Mr. Orrin Harrison, III

## APPENDIX E

BOARD OF ADJUSTMENT

Public Hearing

Council Chambers—City Hall

March 24, 1981

Board Members Present at Public Hearing:

Jay Hauteman, Rev. Rowe,
W. A. Bonds, Michael Brown
Mary Stoddard

Alternates Present But Not Voting: Diana Cobb

Present From Staff:

Jim Self, Executive Officer
Eric Smith, Sherri Dodson, Secretary

Present From Building Inspection:

Ray Couch, Chief Building Inspector

Present From City Attorney's Office:

Barry Knight, Asst. City Attorney

Present From Planning Department:

Gary Sieb, Assistant Director

The Chairman stated that no action of the Board of Adjustment shall set a precedent. Each case must be decided upon its own merits and circumstances. Unless otherwise indicated, each use is presumed to be a legal use. Each appeal must necessarily stand upon the facts and testimony which are presented before the Board of Adjustment at this Public Hearing as well as the Board's inspection of the property.

*BDA 81-126/4409 (Holdover).* Property located at 5555 Amesbury Dr.

Application of Silver Screen, Inc. Application has been made for a permit to erect a TV antenna and charge for service without obtaining a cable franchise from the City Council. The applicant alleges that the Building Inspector's office has errored in his determination that such use is prohibited in the MF-1 zoning district. The building inspector's office has determined that the placement of a free standing antenna for receiving any portion of a radio signal for commercial dissemination within and outside of an apartment, development in an MF-1 zoning district, constitutes a radio, television, or microwave tower use, which is prohibited in said zoning district. Applicant is requesting that the Board render a decision overturning the determination of the Building Inspector and Grant applicant permission to erect a commercial installation consisting of a free standing antenna and a portable accessory building for the reception and transmission of television signals. Appeal is being referred to the Board of Adjustment according to Section 29-701(a) [Dall. Dev. Code § 51-4.703(a)] of Chapter 51 of the Dallas City Code as amended.

Replies Received in Favor: 0

Replies Received in Opposition: 0

STAFF RECOMMENDATION: Uphold Building Inpector's interpretation and deny appeal.

BASIS FOR RECOMMENDATION: 1) The zoning ordinance prohibits such use in an MF-1 zoning district as indicated in Section 10-203 paragraph (d) of said ordinance. 2) The definition of a radio, television or microwave tower is quite clear and said definition #20 reads as follows:

Radio, Television or Micro-Wave Towers: Structures supporting antennae for transmitting or receiving any portion of the radio spectrum but excluding noncommercial installations for home use of radio or television.

The following people appeared to testify at the Pubic Hearing and were sworn in by Mr. Smith:

APPEARING IN FAVOR: H. Lewis Nichols, 1200 Republic Bank Building

APPEARING IN OPPOSITION: None

*MOTION*: Bonds, "Having fully reviewed the decision of the Building Inspector of the City of Dallas, and his determination in Case No. 81-126/4409, on application of Silver Screen, Inc., and having inspected the property in question and heard all testimonies and facts supporting the same, I move that the Board of Adjustment sustain the decision of the Building Inspector and deny the requested application without prejudice."

Seconded by Rowe

AYES: All

* MOTION CARRIED: To Deny the application carried without prejudice.

NOTE: For Detailed information on testimony, refer to the tape retained on file in the Department of Urban Planning.

# BOARD OF ADJUSTMENT

Public Hearing

Council Chambers—City Hall

February 24, 1981

Board Members Present at Public Hearing:

Jay Hauteman, Chairman,
Robert Rowe, Vice Chairman,
W. A. Bonds, Michael Brown, Mary Stoddard

Alternates Present But Not Voting: Dr. Jesse W. Jones

Present From Staff:

Jim Self, Executive Officer
Eric Smith, Sherri Dodson, Secretary

Present From Building Inspection:

Ray Couch, Chief Zoning Inspector

Present From City Attorney's Office:

Barry Knight, Asst. City Attorney

Present From Planning Department:

Gary Sieb, Assistant Director

The Chairman stated that no action of the Board of Adjustment shall set a precedent. Each case must be decided upon its own merits and circumstances. Unless otherwise indicated, each use is presumed to be a legal use. Each appeal must necessarily stand upon the facts and testimony which are presented before the Board of Adjustment at this Public Hearing as well as the Board's inspection of the property.

*BDA8 1-126/4409.* Property located at 5555 Amesbury Dr.

*REQUEST*: Application of Silver Screen, Inc. Application has been made for a permit to erect a TV antenna and charge for service without obtaining cable franchise from the City Council. The applicant alleges that the Building Inspector's office has errored in his determination that such use is prohibited in the MF-1 zoning district. The Building Inspector's office has determined that the placement of a free standing antenna for receiving any portion of a radio signal for commercial dissemination within and outside of an apartment development in an MF-1 zoning district, constitutes a radio, television, or microwave tower use, which is prohibited in said zoning district. Applicant is requesting that the Board render a decision overturning the determination of the Building Inspector and Grant the applicant permission to erect a commercial installation consisting of a free standing antenna and a portable accessory building for the reception and transmission of television of television signals. Appeal is being referred to the Board of Adjustment according to Section 290701(a) [Dall. Dev. Code § 51-4.703(a)] of Chapter 51 of the Dallas City Code as amended.

Replies Received in Favor: 0

Replies Received in Opposition: 0

*STAFF RECOMMENDATION*: Uphold Building Inspector's interpretation and deny appeal.

BASIS FOR RECOMMENDATION: 1) The zoning ordinance prohibits such use in an MF-1 zoning district as indicated in Section 10-203 paragraph (d) of said ordinance. 2) The definition of a radio, television or microwave tower is quite clear and said definition #20 reads as follows: Radio, Television or Micro-Wave Towers; structures supporting antennae for transmitting or receiving any portion of the radio spectrum but excluding noncommercial installations for home use of radio or television.

The following people appeard to testify at the Public Hearings and were sworn in by Mr. Self:

APPEARING IN FAVOR: Lewis Nichols

APPEARING IN OPPOSITION: None

*MOTION*: Bonds, "I move that the Board hold this case over and continue it until the Board's meeting of March 24, 1981:

Seconded by Rowe

AYES: All

*MOTION CARRIED: To hold case over until Board's meeting of March 24, 1981.

NOTE: For Detailed information on testimony, refer to the tape retained on file in the Department of Urban Planning.

## APPENDIX F

## EXCERPTS FROM RELEVANT STATUTES AND ORDINANCES

15 U.S.C.A. § 1

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restaint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .
>
> Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor . . .

15 U.S.C.A. § 2

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

42 U.S.C.A. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Tex. Loc. Gov't Code Ann. § 211.009 (Vernon 1988)

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under the subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so; and

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

(b) In exercising its authority under Subsection (a)(1), the board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the board has the same authority as the administrative official.

. . . .

Tex. Loc. Gov't Code Ann. § 211.010 (Vernon 1988)

(2) Any of the following persons may appeal to the board of adjustment a decision made by an administrative official:

(1) a person aggrieved by the decision; or

(2) any officer, department board, or bureau of the municipality affected by the decision.

. . . .

Dallas Development Code § 51-4.217(a)

(a) *General provisions.*

(1) An accessory use must be a use customarily incidental to a main use. An accessory use not listed in Subsection (b) is permitted if the accessory use complies with Subsection (a)

. . . .

(4) An accessory use must be located on the same lot as the main use, and must not be across a street or alley from the main use.

. . . .

Dallas Development Code § 51-4.703(d)

(d) *Board action.*

. . . .

(3) The board shall have all the powers of the building official on the action appealed from. The board may in whole or in part affirm, reverse, or amend the decision of the building official.

. . . .

(5) The decision of the board does not set a precedent. The decision of the board must be made on the particular facts of each case.

. . . .

Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1488

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CITY OF DALLAS,

*Petitioner,*

*v.*

VIDEO INTERNATIONAL PRODUCTIONS, INC.,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

EDWIN J. HUGHES
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(608) 256-0226
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12pp

## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the chief city building inspector's issuance of zoning violation notices at the request of the Dallas City Council, and in accordance with guidelines established by the City's final zoning policymaker, the City of Board of Adjustment, constitutes the exercise of the City's "final policymaking authority" under 42 U.S.C. section 1983, as interpreted by this Court in *City of St. Louis v. Praprotnik*, 485 U.S._____, 108 S. Ct. 915 (1988).

## PARTIES TO THIS PROCEEDING

In addition to those parties named in the caption, the following is also a party to this proceeding:

Warner-Amex Cable Communications, Inc.
Defendant-Appellee

The following are potential parties to this suit:

| | |
|---|---|
| Frank Parrish | Plaintiff-Appellant |
| Jack Weiss | Plaintiff-Appellant |

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No. 88-1488

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CITY OF DALLAS,

*Petitioner,*

*v.*

VIDEO INTERNATIONAL PRODUCTIONS, INC.,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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# RESPONDENT'S BRIEF IN OPPOSITION

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P.O. Box 1784
Madison, Wisconsin 53701
(608) 256-0226
*Attorneys for Respondent*

## COUNTERSTATEMENT OF THE CASE

The Dallas Board of Adjustment (also known as the Board of Zoning Appeals) is the City of Dallas' final policymaking body for interpretation of the Dallas Zoning Code. The Petitioner City of Dallas does not contest this point. *See* City of Dallas' Petition for Writ of *Certiorari* at 3, 5.

Before the incidents giving rise to this suit, the Chief Zoning Inspector, Ray Couch, had previously requested and received guidance from the Board of Adjustment on enforcing the Dallas Zoning Code in the cable television context. This occurred when a VIP competitor, Silver Screen, had appealed a ruling of the Dallas Building Official that it could not charge for the cable services it rendered to customers. (VIP Tr. Exs. 75-81.)[1] In conjunction with that episode, Couch had requested an interpretation from the Board of Adjustment that non-franchised cable services could not cross property lines or the public right of way. (Couch Tr. III, p. 122.) In March, 1981, the Board of Adjustment adopted this interpretation of the zoning code. *See* Trial Exhibit 62, which contains a transcript of the Silver Screen proceeding before the Board of Adjustment.

On September 2, 1981, the Dallas City Council instructed city officials to issue citations to VIP if VIP's cables were crossing property lines. The Dallas City Council is empowered to regulate and restrict Dallas land use. Tex. Rev. Civ. Stat. Ann. art. 1011a (Vernon Pamp. Supp. 1987).

On September 11, 1981, owners of buildings serviced by VIP were served notices of zoning violations by the City of Dallas. The owners were told they had 15 days to cease use of VIP cable television facilities.

These notices caused VIP's customers to reject VIP's services. In addition, VIP shut down service in order not to be in defiance of the then-current interpretation of zoning law.

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[1] Tr. Exs. means Trial Exhibits; Tr. III, p. 122 means Trial Transcript, Volume III, at page 122.

These actions caused financial harm to VIP.

The zoning violation notices were served at the express instruction of the Dallas City Council. In addition, Ray Couch, chief zoning inspector, testified that VIP's systems were illegal because they crossed lot lines. (Couch, Tr. III, p. 10.) This interpretation was the precise one approved by the Board of Adjustment at Couch's request during the Silver Screen episode. Stated otherwise, the zoning violation notices were authorized by the city council. They were also issued in accordance with a previous interpretation of the zoning code, adopted by the Board of Adjustment.

## REASONS FOR DENYING THE WRIT

a. In what amount to determinations of fact, the courts below correctly found the city's final policymaking authority was behind the notices of zoning violation.

The City of Dallas has argued that this Court should grant its petition for writ of *certiorari* because the zoning violation notices were not "final" government action that could lead to 42 U.S.C. section 1983 liability. The City argues that the actions were taken by municipal officials who did not have policymaking authority under *City of St. Louis v. Praprotnik*, 485 U.S. _____, 108 S. Ct. 915 (1988). *See* Petition for *certiorari* at 6.

The City constructs an elaborate argument concerning the effect of an available procedure whereby VIP could have appealed the violation notices to the Board of Adjustment. According to the City, because VIP could have appealed the notices, the building inspector was not an official imbued with policymaking authority sufficient to subject the City of Dallas to 42 U.S.C. section 1983 liability.

This argument is an attempt to relitigate an essentially factual issue, which the lower courts have correctly decided. The District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals both concluded the zoning

violation notices represented final city policymaking. However, the two courts offered alternative rationales for their findings.

The District Court for the Northern District of Texas found as a matter of fact that the city council authorized the notices. District Court's slip opinion No. CA3-81-1722-D at 26 (N.D. Tex., May 19, 1987) (reproduced in City of Dallas' Petition for *certiorari*, Appendix C, at 30a, 50a). There is no doubt that even an isolated act of a city's properly constituted legislative body is a municipal act which can subject the city to 42 U.S.C. section 1983 liability. *See, e.g., Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980).

The court did not determine whether the building inspector was a final policymaker himself. Instead, the court found the city council a final policymaker under Tex. Rev. Civ. Stat. Ann., art. 1011a (Vernon Pamp. Supp. 1987). The court stated the zoning violation citations "evidence[d] ... city policy." District Court's slip opinion at 26 (reproduced in City of Dallas' Petition for *certiorari*, Appendix C, at 50a).

Unlike the district court, the Fifth Circuit focused on the Board of Adjustment's powers. The Fifth Circuit found that as the highest policymaking body, the Board of Adjustment had already adopted an interpretation of the zoning law which was subsequently applied against VIP. The court's holding was prefigured by the fact that the city itself, in another zoning case, considered the Board's ruling as controlling precedent.

Specifically, after the events which underlie this case, VIP was sold, and its assets eventually formed the basis for a new company called Cable Dallas. In proceedings against Cable Dallas for the same zoning violations complained of here, the City offered Inspector Couch's affidavit in opposition to defendants' summary judgment motion. Couch's affidavit cited the Board of Adjustment's Silver Screen ruling as controlling precedent. Specifically, Couch stated:

> "In Case No. BDA 81-126/4409 on application of Silver Screen, Inc., The Board of Adjustment of

> the City of Dallas upheld the decision of the building official.... The decision of the building official and the upholding of that decision by the Board of Adjustment indicates both the consistent application of the Dallas Development Code to prohibit microwave dish antenna systems from serving more than one building site in residential neighborhoods and supports Plaintiff [sic] contention that the microwave dish antenna systems which are the subject of this suit fall within the radio, television or microwave tower use."

February 26, 1982 Affidavit of Ray Couch In Answer to Defendants' Motion for Summary Judgment in *Cable Dallas*, par. 3 (part of VIP Exhibit 62).

Like the City in the *Cable Dallas* case, the Fifth Circuit found that the Board of Adjustment's interpretation was a final expression of city policy. *Video Int'l Production Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F. 2d 1075, 1087, *en banc reh'g denied*, 866 F. 2d 1417 (5th Cir. 1988) (reproduced in City of Dallas' Petition for *certiorari*, Appendix A at 1a, 22a). Stated otherwise, the Fifth Circuit found that in executing the zoning violation notices, the building inspector was acting pursuant to policy determinations by the Board of Adjustment. Based on this alternative rationale, the Fifth Circuit found that when the Board of Adjustment's policy determination was combined with issuance of zoning violation notices by the highest city official empowered to execute zoning policy, the result was a policy decision that could be attributed to the city. *Video Int'l Production Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F. 2d at 1087 (reproduced in City of Dallas' Petition for *certiorari*, Appendix A at 22a). In light of these facts and these determinations, the theoretical potential for VIP to appeal the matter back to the same board is insufficient to relieve the City of 42 U.S.C. section 1983 liability.

b. The precepts of *City of St. Louis v. Praprotnik* are upheld by the Fifth Circuit's decision.

The city's arguments in support of *certiorari* are attempts to dress a body of facts in a suit of law. As such, the petition must be denied. However, even if the law were the basis of its petition, the city's Petition would still fail.

In *City of St. Louis v. Praprotnik*, 485 U.S. _____, 108 S. Ct. 915 (1988), a plurality of this Court expanded on previous holdings that a municipality could be held liable under 42 U.S.C. section 1983 only for those acts which the municipality officially sanctioned. *Id.*, 108 S. Ct. at 924. The Court recognized that a dilemma could arise when a municipal final policymaker created a policy which a subordinate subsequently ignored. The Court emphasized that the touchstone is the policy itself, not the unauthorized departure from it. *Id.*, 108 S. Ct. at 926. Nevertheless, the Court also noted that under certain circumstances, a final policymaker's post-facto approval of a subordinate's decision could transform that subordinate's decision into an official one.

Here, the City suggests that the Fifth Circuit incorrectly applied this portion of *Praprotnik*. This is allegedly because the Board did not ratify the Building Inspector's VIP decision. City of Dallas' Petition for *certiorari*, at 8.

*Praprotnik*, however, is not to be interpreted so mechanistically. In noting the subordinate-departure scenario, the Court made a general statement about the effect of subsequent approval. *Praprotnik* did not, however, lay down a rule that only post-facto approval of a discretionary decision would make a subordinate's action into official policy. Instead, the Court specifically cautioned that a municipality could be liable under 42 U.S.C. section 1983 "if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker." *Id.*, 108 S. Ct. at 927.

In this case, the supervising policymaker Board of Adjustment had expressly pre-approved the Building Inspector's

interpretation of the Dallas Zoning Code. Further, the city council authorized the sending of the zoning violation notices. Thus, this case fits squarely within the Court's admonition. The Building Inspector carried out policy. The City Council helped set that policy. In sending out zoning notice violations, the Building Inspector relied upon an interpretation of the zoning code which the Board of Adjustment had expressly pre-approved. Under these circumstances, there is no *Praprotnik* subordinate-departure problem.

The concurring justices in *Praprotnik* noted that they would have found municipal liability under 42 U.S.C. section 1983 where an official or legislative body made a decision which inflicted harm, even though the decision giving rise to the harm was not intended to govern future situations. *Id.*, 108 S. Ct. at 932. By applying this alternative rationale, the City of Dallas would also be liable here. The Board of Adjustment was responsible for the adoption of the interpretation of zoning law later specifically applied against VIP. Similarly, the City Council specifically requested application of the zoning law against VIP. Consequently, under the consurrence's rationale, this is more than sufficient to establish the city's liability.

The Fifth Circuit correctly applied *Praprotnik* to the facts of this case. The Petition for Writ of *Certiorari* should be denied.

## CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the City of Dallas' Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

EDWIN J. HUGHES
*Counsel of Record*
STAFFORD, ROSENBAUM, RIESER, & HANSEN
3 South Pinckney Street, Suite 1000
P.O. Box 1784
Madison, Wisconsin 53701
(608) 256-0226

*Attorneys for Respondent*
*Video International Productions, Inc.*

*April 6, 1989*